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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
Implementation of Section 309(j)) PP Docket No. 93-253
of the Communications Act -)
Competitive Bidding)

PETITION FOR RECONSIDERATION

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January 6, 1995

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SUMMARY

BET Holdings, Inc. ("BHI") urges the Federal Communications Commission ("Commission") to modify its broadband Personal Communications Services ("PCS") rules to ensure greater diversity among providers of broadband PCS. Specifically, BHI urges the Commission to:

- Eliminate the cumulative bidding credit scheme and equalize the bidding credit afforded minority and women-owned entities. Not only is the present scheme contrary to Congressional mandate and unsupported by the record, it will lead to perverse results.
- Increase the bidding credit provided minority and/or women owned entities to a minimum of 40 percent. The present level of 15 percent, even within a designated entity block, will not assist under-represented telecommunications providers in successfully bidding for PCS spectrum.
- Clarify that an applicant which satisfies the Control Group Minimum 50.1 Percent Equity Requirement (Section 24.709(b)(6)(ii)) also satisfies the definitional requirements of a Business Owned by Members of Minority Groups and/or Women (Section 24.720(c)). Section 24.709(b)(6)(ii) allows non-designated entity participation in a designate entity control group; Section 24.720(c) appears to prohibit such participation.
- Clarify that publicly-traded entities are exempt from the de minimis equity interest requirement (Section 24.720(o)). The current rules penalize a licensee if there is an acquisition of equity in its preexisting entity beyond five percent. The rule ignores the fact that publicly-traded companies do not control the sale of stock it issues in the open market.
- Clarify that the "existing investor" is the beneficial owner of the stock, not necessarily the owner of record. The current rule ignores the fact that the owner of record may not be the beneficial owner and that the beneficial owner may not be the owner of record.

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PETITION FOR RECONSIDERATION

BET Holdings, Inc. ("BHI") hereby submits this Petition for Reconsideration of the Federal Communications Commission's ("Commission") Fifth Memorandum Opinion and Order in the Competitive Bidding Rulemaking proceeding.^{1/} The Fifth Opinion and Order modified the Commission's Personal Communications Services ("PCS") rules to provide greater flexibility for designated entity participation in the broadband PCS bidding process. Specifically, the Commission refined its equity ownership requirements to enhance the ability of women and minority-owned entities to attract capital for license acquisition and system build-out. The Commission did not, however, alter the bidding credit rules that currently afford minority and women-owned entities a 15 percent bidding credit and "small" minority and women-owned entities a 25 percent bidding credit.

BHI requests that the Commission: (1) equalize the level of bidding credits for minority and/or women-owned

1/ See Fifth Memorandum Opinion and Order, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, FCC 94-285 (released November 23, 1994) ("Fifth Opinion and Order").

entities; (2) raise the level of bidding credits afforded minority and/or women owned entities to 40 percent; (3) clarify that an applicant that satisfies Section 24.709(b)(6)(ii) of the Commission's Rules also qualifies as a "Business Owned by Members of Minority Groups and/or Women"; (4) clarify that publicly traded corporations are exempt from the de minimis equity interest rule of Section 24.709(b)(6)(ii); and (5) clarify that the "existing investor" is the beneficial owner of the stock and not necessarily the owner of record. BHI believes that these modifications will encourage robust bidding in the entrepreneur's blocks and promote advances in designated entity ownership of telecommunications licenses and properties.

I. THE COMMISSION MUST ALTER ITS MINORITY AND WOMEN-OWNED ENTITY BIDDING CREDIT SCHEME.

A. The Unequal Distribution of Bidding Credits Among Minority and/or Women Owned Companies Is Contrary to Congressional Intent, Not Supported by the Record and Will Create Perverse Results.

Congress charged the Commission with promoting economic opportunity and competition by disseminating PCS licenses among a diverse group of licensees. In response, the Commission adopted a bidding credit scheme that discounts the purchase price of PCS spectrum depending on the identity of the auction participant. Bidding credits are intended to offset the significant barriers facing women and minority-owned firms in obtaining capital.^{2/}

^{2/} As the Commission explained, "the bidding credit will function as a discount on the bid price a firm will actually have (continued...)"

Accordingly, under the Commission's Rules, women and minority-owned firms will receive a 15 percent payment discount that is applied against the amount they bid on licenses, while small firms owned by women or minorities will receive a 25 percent bidding credit.^{3/}

The unequal distribution of bidding credits among minority and/or women-owned companies will create perverse effects, limiting financing opportunities for large minority and women-owned firms while encouraging designated entity "fronts." The 10 percent bidding credit differential will cause potential financing partners to seek out small minority-owned firms and individuals, instead of BHI, because the value of the cumulative enhancements outweighs other benefits brought to the table by firms such as BHI, such as extensive telecommunications experience. The effect of the inequality of the bidding credit scheme has not been addressed explicitly by the Commission.^{4/}

2/ (...continued)
to pay to obtain a license and, thus, will address directly . . . financing obstacles..." See Fifth Report and Order, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 9 FCC Rcd 5532, 5590 (1994) ("Fifth Report and Order").

3/ Fifth Opinion and Order at ¶ 97. To qualify as a small business, the applicant, including attributable investors and affiliates, must cumulatively have less than \$40 million in gross revenues.

4/ Although, on reconsideration, the Commission reaffirmed its established bidding credit structure, it failed to address the inadvertent impact of unequal bidding credits on the ability of minority and women-owned entities to compete with small minority and women-owned entities for PCS spectrum.

The Commission has failed to demonstrate that unequal treatment is warranted. Nothing in the record supports the proposition that small minority and/or women owned business require special assistance. In both the Budget Act and its legislative history, Congress directed the Commission to promote "economic opportunity for a wide variety of applicants, including small business, rural telephone companies, and businesses owned by members of minority groups and women"^{5/} Each enumerated group is eligible for preferential treatment in the assignment of radio spectrum. Congress did not direct or require effective preferences only for "small" minority-owned business, or in any way limit the availability of minority preferences.^{6/} To limit effective bidding credits to "small" minority-owned business, particularly in light of the effects of that limitation, contradicts the explicit and unambiguous directive of Congress.

The measures adopted for minority-owned entities are necessary to achieve the stated Congressional objective of ensuring minority participation in spectrum-based services. The SBAC Report affords more than sufficient evidence of minority under-representation in telecommunications ownership. SBAC

^{5/} See Budget Act, P.L. 103-66, § 6002 Sections 309(j)(3)(B) and (4)(C).

^{6/} See e.g. House Report No. 103-111 at 255 ("the Commission should adopt regulations ... to ensure that business owned by members of minority groups and women are not in any way excluded from the competitive bidding process") (emphasis added).

Report at 3, et seq.^{7/} The Report's conclusions are confirmed by other sources. The U.S. Census' Survey of Minority-Owned Business Enterprises, for example, reveals that only 6.34% of the firms in the communications category are minority-owned, and those firms represent a minuscule 1.52% of sales and receipts in that industry.^{8/} Minorities are thus substantially under represented in the telecommunications industry, supporting the adoption of remedial measures to facilitate their fuller participation.

Indeed, "[a]bsent such measures targeted specifically to women and minorities, it would be virtually impossible to assure that these groups achieve any meaningful measure of opportunity for actual participation in the provision of broadband PCS."^{9/} This finding is in stark contrast to the one line in the Fifth Report and Order concluding that small firms owned by women and minorities require an enhanced bidding credit.^{10/} There is neither a legislative mandate nor support in

7/ See Small Business Advisory to the FCC regarding, GEN Docket No. 90-314, Sept. 15, 1993. As the Commission recognizes, the preferences depend on a Congressional mandate. Notice of Proposed Rulemaking, 8 FCC Rcd 7635, 7646 and at n. 48 (1993) ("Notice"), quoting Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 568 (1990).

8/ U.S. Census, 1987 Economic Censuses, Survey of Minority-Owned Business Enterprises -- Summary (August 1991) at Tables 1, 10.

9/ Fifth Report and Order at 5590.

10/ Id.

the record for the creation of invidious preferences favoring "small" minority-owned businesses.

Furthermore, the Commission offers no support for the supposedly "reasonable assumption" that women or minority-owned companies with somewhat greater revenues should be treated differently than women or minority-owned companies that are considered "small" under the Commission's rules. The evidence cited by the Commission illustrates undeniably that minorities and women suffer discriminatory treatment in capital markets, regardless of the size of their businesses. Marginally larger companies cannot be treated differently in the preferences afforded for their participation consistent with the Commission's goals because the 10 percent advantage translates into a more than marginal multi-million dollar bonus.

In fact, this disparate treatment, coupled with small business consortia rules that permit cumulation of revenues and assets of cooperating parties, is arbitrary and unlawful. For instance, a minority-owned small business consortia comprised of four \$39 million companies would benefit from the 25% bidding credit, while limiting BHI, with fewer revenues, to a 15% bidding credit.^{11/} Thus, under the rules, smaller enterprises could be disproportionately disadvantaged, contrary to the Budget Act and Commission policies underlying the designated entity rules. The cumulative credit rules must, therefore, be modified to provide

^{11/} Furthermore, there is no limit on the financial assets small businesses or persons can aggregate under this rule.

all minority and women-owned business the same bidding credit preference.

The disparate bidding credit scheme will promote relationships with small partners that offer little more than their status as women and minorities. These partnerships are precisely the type of arrangements of which the Commission should be wary. The Commission's policies must discourage large companies from creating small "designated entity" companies solely for the purpose of participating in PCS.^{12/}

In addition, the Commission's 25 percent bidding credit to "small" minority and women-owned corporations unfairly disadvantages substantial women and minority-owned businesses by funneling investment to inexperienced persons and companies. An investor seeking PCS opportunities is given an added incentive to partner with an inexperienced company, afforded a 25 percent bidding credit, and is discouraged from concluding an agreement with a successful women or minority-owned entity afforded a bidding credit of only 15 percent.

This result is contrary to the public interest. The Commission's rules should not direct financial resources away from women and minority-owned entities with proven track records. Rather, the Commission's policy should be neutral, encouraging resources to be directed to designated entities with the

^{12/} See e.g. "Big Firms Take Business Slated For Minorities," N.Y. Times, August 11, 1994 (noting trend of large brokerage firms to taking advantage of "set-aside" programs).

technical and telecommunications expertise to thrive in a rapidly changing and highly competitive environment.

B. The Commission Must Provide All Minority-Owned Entities a Bidding Credit of at Least 40 Percent, Regardless of Their Size.

There can be little doubt that to succeed in the broadband PCS auction a company must be prepared to spend millions, perhaps hundreds of millions of dollars. Given the experience with the narrowband PCS auction, unless substantial changes in the scope of preferences are made available to designated entities, they will be relegated to the sidelines as affiliates of major telecommunications providers bid up prices for C and F block licenses.^{13/} The 25% bidding credit for women and minority entities in the narrowband PCS auction did not adequately assist those designated entities. It is also irrefutable that designated entities simply do not have access to the amount of capital available to established telecommunications providers. If the Commission expects to address the Congressional mandate to reverse the exclusion of women and minorities from participation in the telecommunications industry,

^{13/} The nationwide narrowband PCS winning bids ranged from \$37-million to \$80-million dollars per license, and the winners included the largest paging and cellular communications companies in the country: Paging Network, Inc.; McCaw Cellular Communications, Inc.; Mobile Telecommunications Technology Corp.; AirTouch Paging; Pagemart II, Inc.; and BellSouth Wireless. None of the auctioned licenses went to small business or firms owned by women or minorities. See "Bidding Battle for Airwaves Goes Sky High," Washington Post, A1, July 30, 1994.

then it must provide a meaningful opportunity to designated entities.

Providing successful minority businesses a 15% bidding credit, when a 25% bidding credit has already been demonstrated as insufficient, is contrary to experience and in contravention of legislative intent. All women and minority-owned business, regardless of size, must be given at least a 40% bidding credit.^{14/} The necessity of raising the bidding credit to at least 40% was recently recognized in the reconsideration of the rules governing the regional narrowband auctions.^{15/} Although BHI recognizes that the enhanced bidding credit would be applied in a context in which the parties eligible to bid for specific spectrum is limited,^{16/} BHI maintains that a bidding credit greater than 15 percent is necessary to achieve the Congressional goal of ensuring that minorities and women are successful in the broadband PCS bidding process. The Commission must provide meaningful opportunities, not further roadblocks, to successful

^{14/} Representative Mfume suggested that a bidding credit of 72% may be necessary to permit designated entities to compete with companies with tremendous cash flows. See Federal News Service, May 20, 1994, Comments of Rep. Mfume, Before the Finance and Urban Development Subcommittee of the House Small Business Committee; SUBJECT: Discrimination in Telecommunications; CHAIRED by Rep. Kweisi Mfume (D-MD); WITNESSES: Reed Hundt, FCC Chairman.

^{15/} See Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, PP Docket No. 93-253, GEN Docket No. 90-314 and ET Docket No. 92-100, FCC 94-219, at ¶ 87 (adopted August 16, 1994, released August 17, 1994) (1994).

^{16/} See Fifth Opinion and Order at ¶ 99.

women and minority-owned firms interested in providing PCS service.^{17/}

II. THE COMMISSION MUST CLARIFY ITS DESIGNATED ENTITY ELIGIBILITY RULES

A. An Applicant That Satisfies The Requirements Of Section 24.709(b)(6)(ii) Also Qualifies As A "Business Owned By Members Of Minority Groups And/Or Women."

Section 24.709(b)(6)(ii) provides that an applicant whose control group's sole member is a preexisting entity may elect the 50.1 percent equity requirement, with the limitation that "only 20 percent of the applicant's (or licensee's) total equity must be held by qualifying minority and/or women investors and that the remaining 30.1 percent of the applicant's (or licensee's) total equity may be held by qualifying minority and/or women investors or non-controlling existing investors in such control group member or individuals that are members of the applicant's (or licensee's) management." This provision allows "entities that are controlled by minorities and/or women, but that have investors that are neither minorities nor women, to be part of the control group."^{18/}

The requirements set out in the definition of a "Business Owned by Members of Minority Groups and/or Women"

^{17/} Should the Commission modify its Rules in accordance with these proposals, BHI also urges that small businesses be provided a 20% bidding credit if they are to be successful in the PCS auction. No additional disproportionate benefit should be afforded to "small" minority-owned businesses.

^{18/} See Fifth Opinion and Order at ¶ 62.

appear to contradict Section 24.709(b)(6)(ii) and the modifications made in the Fifth Opinion and Order. Section 24.720(c) requires that the "qualifying investor members of an applicant's control group" be "members of minority groups and/or women." Applicants that elect to satisfy the requirements of Section 24.709(b)(6)(ii) will find it impossible to satisfy the requirements of Section 24.720(c) because the entity comprising the PCS applicants' control group, as an entity, will not be a member of a minority group or a woman but will be a preexisting company whose ownership is shared with entities that are not members of minority groups or women. In fact, Section 24.709(b)(6)(ii) specifically provides for their investment in PCS applicants to facilitate capital formation by historically disadvantaged bidders.

As the Commission has recognized, to prohibit participation by persons other than minorities and women in minority and/or women-owned companies would severely reduce financing opportunities and limit designated entity participation in the PCS marketplace. The Commission should, therefore, clarify that an applicant satisfying the requirements of Section 24.709(b)(6)(ii) also qualifies as a "Business Owned by Members of Minority Groups and/or Women." This clarification eliminates internal inconsistencies and does not alter the Commission's specific equity ownership requirements for businesses owned by minorities or women.

B. Certain Acquisitions of Stock of Publicly Traded Corporations Are Exempt From the De Minimis Equity Interest Requirement.

Section 709(b)(6)(ii) provides that the 50.1% minimum equity requirement applies to a licensee whose control group's sole member is a preexisting entity, except that 20% of that 50.1% must be held by qualifying minority and/or women investors while the remaining 30.1% may be held by non-controlling existing investors. An existing investor includes any person or entity that acquires in the future a de minimis equity interest (five percent or less).^{19/} This restriction is in effect for three years.

As such, a PCS licensee will violate the eligibility standards if, during the initial three-year period, any person or entity acquires more than five percent of the equity in the preexisting entity. This rule ignores the marketplace realities faced by publicly-traded companies and should be modified to exempt from its operation the ownership of stock in publicly traded companies that is acquired from an existing stockholder.

Publicly-traded companies do not control the sale of their stock in the open market. Accordingly, a stockholder can buy over the de minimis limit of the preexisting entity's equity, creating an unanticipated and irreparable violation by the licensee. Despite the Commission's recognition that "the identity of non-controlling investors ... particularly in

^{19/} See Section 24.720(o).

publicly-traded companies, will change regularly"^{20/} it has crafted a rule that could be violated unwittingly.

BHI proposes that Section 709(b)(6(ii) be modified to exempt acquisitions of publicly-traded stock over which the issuer has no control or modify the definition of "de minimis" to reflect the specific hardships faced by publicly traded companies in monitoring their stock ownership. The Commission has recognized in these proceedings that publicly-traded companies must be treated differently because they have little control over the ownership of their stock.^{21/} The modification will not hamper the Commission's ability to scrutinize any significant "equity reshuffling," or otherwise prevent fronts.

C. The "Existing Investor" Is The Beneficial Owner Of The Stock And Not Necessarily The Owner Of Record.

The Commission has defined "existing investor" as the "owner of record" of an entity's stock.^{22/} It is common practice for stock in a publicly-traded company, however, to be held of record by brokers or other nominees for the benefit of the

^{20/} See Fifth Opinion and Order at ¶ 68.

^{21/} See Order on Reconsideration 9 FCC Rcd 4493, 4495 (1994) (attribution level raised from 5 percent of the voting stock to 15 percent because of hardship to publicly-traded companies where stock is widely held and there is little ability to control insubstantial stock ownership); Fifth Report and Order at 5603 (attribution level for publicly-traded entrepreneurs set to avoid hardship on publicly-traded companies which have little control over the ownership of their stock and whose voting stock is typically widely held).

^{22/} See Section 24.720(o).

beneficial owners of the stock. Therefore, changes in the record ownership of a company's stock may not reflect changes in the beneficial ownership.

Under the rules as written, a broker holding stock as the record owner on behalf of a dozen beneficial owners may easily acquire an equity interest in a preexisting company beyond the 5% de minimis limit. Thus, creating a violation of the Commission's rules as explained above. BHI proposes that the Commission clarify Section 24.720(o) so that it refers to the beneficial owner of the stock, not the "owner of record." This clarification will reflect the practices and realities of the marketplace, and it will aid in addressing the Commission's concerns regarding the prevention of fronts.

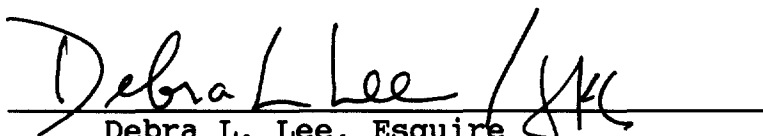
III. CONCLUSION

For the foregoing reasons, BHI requests that the Commission implement the following remedies regarding the treatment of designated entities as established in the Fifth Opinion and Order: (1) modify the bidding credit scheme so that all minority and/or women owned entities are treated the same, regardless of size; (2) increase the bidding credit for minority and/or women-owned entities to 40 percent; (3) modify the definition of "Businesses Owned by Members of Minority Groups and/or Women" to clarify that businesses which satisfy Section 24.709(b)(6)(ii) also satisfy the requirements of that definition; (4) clarify that publicly-traded corporations are

exempt from the rule limiting acquisition of stock where the issuer does not control such acquisition; and (5) clarify that the existing investor refers to the beneficial owner of the stock, not necessarily the owner of record. These modifications will ensure that the Commission provides meaningful opportunities for minority-owned firms to participate in providing broadband PCS services to the public.

Respectfully submitted,

BET HOLDINGS, INC.

A handwritten signature in dark ink, appearing to read "Debra L. Lee" followed by a stylized flourish or set of initials.

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